

December 1926

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### Recommended Citation

Kenneth E. Michael, *Freedom of the Press Under Our Constitution*, 33 W. Va. L. Rev. (1926).

Available at: <https://researchrepository.wvu.edu/wvlr/vol33/iss1/3>

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## FREEDOM OF THE PRESS UNDER OUR CONSTITUTIONS\*

BY KENNETH E. MICHAEL\*\*

Any consideration of the subject of freedom<sup>1</sup> of the press<sup>2</sup> under our constitutions<sup>3</sup> for the sake of clearness most necessarily include: First, a brief historical survey of the high points in the development of freedom of the press as we have it today; Second, an examination of the authorities for the purpose of determining the status of freedom of the press under our Federal and West Virginia constitutions, together with a presentation of the leading problems in this field in connection with a discussion of the various methods of restricting the liberty of the press; and finally, a consideration of those general principles which should be adhered to by our courts in the interpretation of those constitutional provisions which affect the freedom of the press.

Before proceeding further with this inquiry it is perhaps advisable to call attention to certain conclusions which

\* The James F. Brown Prize Thesis, 1925-26. In 1919 the late James F. Brown, of the class of 1873, gave \$5,000.00 to the University to be invested by it and the income used as a prize for the best essay each year on the subject of the individual liberties of the citizen as guaranteed by our constitutions. Any senior or any graduate of any College of the University, within one year after receiving his bachelor's degree, may compete for this prize.

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<sup>1</sup> The words "freedom" and "liberty" are treated here as synonymous terms.

We are, of course, primarily concerned with mental freedom here. An early writer sums up his conclusions on this point in these words: "It is the opinions men entertain, and the feelings they cherish, respecting those who disown the beliefs they deem important, which makes this country not a place of mental freedom." AN ESSAY ON LIBERTY: JOHN STUART MILL, 1859.

There are few expositions of the principle of liberty which can surpass that given by Charles Evans Hughes. He said: "It is important to remember, as has well been said, that the essential characteristic of true liberty is, that under its shelter, many different types of life and character and opinion and belief can develop—unmolested and unobstructed \* \* \* Let not the vital principle be obscured by mere discussions of constitutional power \* \* \* Some may still entertain the notion that democracy means liberty \* \* \* (But) Democracy has its own capacity for tyranny. Some of the most menacing encroachments upon liberty invoke the democratic principle and assert the right of the majority to rule \* \* \* The interests of liberty are peculiarly those of individuals, and hence of minorities, and freedom is in danger of being slain at her own altars if the passion for uniformity and control of opinion gathers head \* \* \* We are apt to be unmindful of the other aspects of liberty and of the supreme aim and justification of the law-making of free men and women, which should ever be found, not in the satisfactions of the lust of power, not in an imperious domination and command of uniformity, but in the purpose to secure the freedom of the individual—an ordered freedom, but still freedom—subject only to such restraints as a sound and tolerant judgment determines to be essential to the mutuality of liberty \* \* \* After all allowances are made for multiplying laws and complex administration, after all the proper demands of an intricate social life have been fairly met, there still remain the old categories—or let us call them citadels—of individual liberty which are not to be

must be patent to all who have made a careful investiga-

surrendered. What are these? The Supreme Court of the United States has recently described them in these words: "Liberty denotes not merely freedom from bodily restraints, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." "Liberty and the Law," an address by Charles Evans Hughes before the American Bar Association, 2 AM. B. ASSO. JOURN. 568, *Italics ours*.

Speaking of the guaranties of liberty in our Bills of Rights, Dean Pound of Harvard Law School says: "Liberty in such connections was taken to mean, in the Nineteenth Century, and still is sometimes taken to mean, that the individual shall not be held legally unless for a fault, unless for an act on his part which infringes another's right, and that another shall not be permitted to exact of him except as and to the extent he has willed a relation to which the law in advance attached such power to exact." POUND, *SPRINT OF THE COMMON LAW*, 143.

Walter Lippmann, referring to the prosecutions under the Espionage Act during the recent World War, writes: "From our recent experience it is clear that the traditional liberties of speech and opinion rest on no solid foundation \* \* \* suppression is felt, not simply by the scattered individuals who are actually suppressed. It reaches back into the steadiest minds, creating tension everywhere; and the tension of fear produces sterility. Men cease to say what they think; and when they cease to say it they soon cease to think it. They think in reference to their critics and not in reference to the facts \* \* \* We have learned that many of the hard won rights of man are utterly insecure. It may be that we cannot make them secure by imitating the earlier champions of liberty."

Lippmann makes it clear that the classic absolutist doctrine of liberty has no place in a practical world. "There are," he says, "so far as I can discover, no absolutists of liberty. I can recall no doctrine of liberty, which, under the acid test, does not become contingent upon some other ideal. The goal is never liberty, but liberty for something or other. For liberty is a condition under which activity takes place, and men's interests attach themselves primarily to their activities and what is necessary to fulfill them, not the abstract requirements of any activity that might be conceived \* \* \* The classic doctrine of liberty consists of absolutes. It consists of them except at the critical points where the author has come into contact with objective difficulties. Then he introduces into the argument, somewhat furtively, a reservation which liquidates its universal meaning and reduces the exalted plea for liberty in general to a special argument for the success of a special purpose \* \* \* We are peculiarly inclined to suppress whatever impugns the security of that to which we have given our allegiance. \* \* \* What each seems to say is that opinion and action should be free; that liberty is the highest and most sacred interest of life. But some where each of them inserts a vessel clause to the effect that 'of course' the freedom granted shall not be employed too destructively. It is this clause which checks exuberance and reminds us that, in spite of appearances, we are listening to finite men pleading a special cause. Among the English classics none are more representative than Milton's *Areopagitica* and the *Essay on Liberty* by John Stuart Mill. Of living men Mr. Bertrand Russell is perhaps the most outstanding advocate of liberty. Yet nothing is easier than to draw texts from each which can be cited either as an argument for absolute liberty or as an excuse for as much repression as seems desirable at the moment."

The learned author then calls attention to Milton's argument against popery; to Mill's assertion that "even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act." He points out that "Clearly there is no escape here for Debs or Haywood or obstructors of Liberty Loans;" and that Mill's argument "is exactly the one employed in sustaining the conviction of Debs." Lippman then shows how Russell's loyalty to the unfettered development of the "creative instincts" is in marked contrast to his advocacy of the restriction of the "possessive impulses." "Where Milton said no 'tolerated popery,' Mr. Russell says, no tolerated 'possessive impulses.'"

As Lippman says: "The notion of indifference is too feeble and unreal a doctrine to protect the purpose of liberty" \* \* \* because "It is clear that in a society where public opinion has become decisive, nothing that counts in the formation of it can really be a matter of indifference."

The learned author points out that the attempts to draw fine distinctions between "license" and "liberty" is fundamentally a negative part of the day's work in that "It consists in trying to make opinion responsible to prevailing social standards, whereas the really important thing is to try and make opinion increasingly responsible to facts" by (1) protection of the sources of the news, (2) organization of the news so as to make it comprehensible, and (3) education of human response. He concludes that "A useful definition of liberty is obtainable only by seeking the principle of liberty in the main business of human life, that is to say, in the process by which men educate their response and learn to control their environment. In this view liberty is the name we give to measures by which we protect and increase the veracity of the information upon which we act." LIPPMAN, *LIBERTY AND NEWS*. *Italics ours*.

<sup>2</sup> For the purposes of this discussion the "press" shall be understood to include newspapers and other periodicals, books, and any other publications which are open to public inspection.

<sup>3</sup> "Our Constitutions" shall be taken to include the Federal and the West Virginia Constitutions, since all of the state constitutions contain essentially the same provisions relating to freedom of the press. The only essential difference in wording is found in the West Virginia Constitution, as we shall see later.

tion of this subject. It is clear that the problem is essentially the same regardless of whether it concerns "speech" or "press."<sup>4</sup> Most of the disagreement as to what will amount to a constitutional abridgment of the liberty of the press occurs in connection with a consideration of restrictions imposed in abnormal times.<sup>5</sup> Fundamental principles and rules of interpretation, for the most part at least, are settled. Controversies center around their application to concrete cases.<sup>6</sup> The recent tendencies toward socialization of the law sponsored by such men as Mr. Justice Holmes,<sup>7</sup> Judge Cardozo,<sup>8</sup> Dean Pound of Harvard Law School<sup>9</sup> and other eminent authorities, have gone far toward rationalizing and harmonizing recent decisions involving constitutional questions in general. As we shall see presently, they have left their impress in this field in no small degree. No extended comment or citation of authority is needed to show that any sort of "freedom" or "liberty" under our constitutions does not mean license, but rather an exercise of the rights connotated by these terms under the law.<sup>10</sup> Nor need we pause long to convince the most skeptic critic that in order to determine with any degree of certainty what is meant by freedom of the press under our constitutions for the past, present or future, we must look to the common law precedents, constitutional provisions and statutes, together with their principles of interpretation, relating to the common-law libels, of defamation, sedition, obscenity and blasphemy.<sup>11</sup> The power of the courts to punish for contempt has been invoked also against publications calculated to imperil the integrity of the court. In addi-

<sup>4</sup> 31 W. VA. LAW QUAR. 273.

<sup>5</sup> *Idem*.

<sup>6</sup> *Lochner v. New York*, 198 U. S. 45, 76 (1905); *Ellis v. United States*, 206 U. S. 246, 260 (1907).

<sup>7</sup> HOLMES "PATH OF THE LAW," 10 HARV. L. REV. 456, 467.

<sup>8</sup> CARDOZO, NATURE OF THE JUDICIAL PROCESS, 65-97. At page 66 the author says: "The first cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence \* \* \* I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance."

<sup>9</sup> POUND, SPIRIT OF THE COMMON LAW 110 and 164.

<sup>10</sup> "Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless one." HALE, LAW OF THE PRESS 274.

<sup>11</sup> See 5 VA. L. REV. 228, 243; 2 MINN. L. REV. 244; 12 C. J. 952 *et seq.*

"We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guarantees were established, and in reference to which they have been adopted." COOLEY, CONSTITUTIONAL LIMITATIONS 518.

tion to these liabilities after publication for abuses of the liberty of the press certain previous restraints imposed directly by censorship, injunction and exclusion from second class mailing privileges, and indirectly by advertising patronage and control of news gathering agencies, should be mentioned.<sup>12</sup>

It is clear that the view that the First Amendment may be ignored in times of national strife is unsound and has been officially repudiated.<sup>13</sup> In direct opposition to this is the belief of many agitators that under the constitutional guaranty all writing is free, and only action can be restrained and punished.<sup>14</sup> This view is equally untenable.<sup>15</sup> Let us see what guides the experiences of the past offer to assist us in maintaining that healthy medium which will insure a *proper balance* between the *greatest possible liberty* and the *general welfare* which, after all, is the difficult question to be settled here. That there is a twilight zone wherein a delicate adjustment of its proper limits depends upon a judicial "intuition more subtle than the most articulate major premise" and a proper balancing of social values, is attested by all great present day legal thinkers. Mr. Justice Holmes has made it clear that herein lies the key to a proper solution of most constitutional questions.<sup>16</sup>

Long before the invention of printing it was not uncommon for governments to suppress or punish the expression of opinions calculated to disturb the existing order. In the fifth century before Christ, Protagoras was expelled from Athens for expressing doubt as to the existence of Gods, and his books were burned. According to Eusebius, the Emperor Diocletian burned the Christian Scriptures, and in turn the Church waged a relentless war against heretical writings. The works of the great heretic, Arius, were condemned to the flames by the Council of Nicaea, in the year 325. The Roman Church issued a list of proscribed books, possibly as early as 494, and in the thirteenth century the works of Aristotle were put under the ban.<sup>17</sup>

<sup>12</sup> On contempt of court see HALE, LAW OF THE PRESS Ch. 5. On news-gathering agencies, see *idem*, Ch. 8. On advertising see *idem*, Ch. 10.

<sup>13</sup> CHAFEE, FREEDOM OF SPEECH 7, n. 5.

<sup>14</sup> SCHROEDER, OBSCENE LITERATURE AND CONSTITUTIONAL LAW.

<sup>15</sup> CHAFEE, FREEDOM OF SPEECH 7, n. 6. This view is erroneous because it is based on a false major premise by which the guaranty is given a literal interpretation, instead of the significance it bore to the framers. 13 COL. L. REV. 732, n. 2; 10 HARV. L. REV. 456; 29 HARV. L. REV. 683.

<sup>16</sup> 10 HARV. L. REV. 457; 29 HARV. L. REV. 683.

<sup>17</sup> Much of this and the following history has been taken from 5 VA. L. REV. 225; 2 MINN. L. REV. 239; HALE, LAW OF THE PRESS, Ch. 6; 22 CASE AND COMMENT 476-7.

## FREEDOM OF THE PRESS UNDER OUR CONSTITUTIONS 33

But it was the invention of printing, about the middle of the fifteenth century, that called into most intense activity the opposition to freedom of thought. From that time to the present day governments have sought to prevent the publication and circulation, and even the reading, of writings deemed hurtful to government, religion, or morality. Such a course is logical where government does not rest on the enlightened consent of the people. It is only when government has nothing to fear from criticism that freedom of discussion can be safely permitted. The fluctuations in the degree of the liberty of the press in the history of the several nations accurately reflect the course of the struggle for liberty in general.

Several principal methods have been employed for restricting freedom of the press. A simple method is the prohibition of the reading of objectionable works or the destruction of the works themselves. But the press has been restrained chiefly by the establishment of a censorship, the punishment of authors and publishers, the limiting of the right to own, or use printing presses; and in recent times by control of news distributing agencies and by advertising patronage.

The first index, or list of prohibited books in the modern sense, was published by Pope Paul IV, through the Inquisition at Rome, in 1557. Among the books that have been placed on the lists issued by the Roman Church are the works of Galileo, Copernicus, Grotius, Gibbon, Bacon, Milton, Locke, Adam Smith, and John Stuart Mill. The Roman index was, of course, not operative in England after the Reformation, but many books have been burned by the English authorities, among them early translations of the Bible and Milton's *Defensio Pro Populo Anglicano*. Within about half a century after the invention of printing, Pope Alexander VI, in 1501, introduced the principle of the censorship by a bull against unlicensed printing. Clerical censors were established by the Roman Church in 1515.

After the Reformation the control of the press was exercised mainly by the Crown. Printing was restrained by the appointment of licensors, and by patents and monopolies. The privilege was confined, in the first instance, under regulations established by the Star Chamber in

Queen Mary's reign, to members of the Stationers' Company.<sup>18</sup>

In 1581 it was made a capital offense by statute "to write, print or set forth any manner of book, rhyme, ballad, letter or writing containing any false or seditious matter to the defamation of the Queen's Majesty, or the encouragement of insurrection within the realm."<sup>19</sup> Under James I and Charles I by the strained construction put upon this statute by the judges, the notorious Star Chamber, under Archbishop Laud, severely repressed all political and religious discussion. In 1637 the Star Chamber published a drastic ordinance against the press. In 1640 the Long Parliament liberated prisoners condemned by the Star Chamber. The Star Chamber was abolished in 1641 and for a short time the press was free. During the next twenty years, to the Restoration, more than 30,000 political pamphlets and newspapers were issued. But when the Puritans came into power they passed an ordinance in 1643, establishing the censorship with all of its former vigor. It was this ordinance which called forth in 1644, Milton's famous "*Areopagitica*," or plea "*For the Liberty of Unlicensed Printing*," in the form of an address to Parliament, itself an unlicensed work.<sup>20</sup>

Under the Independents and the Protectorate the press fared somewhat better, but was not free. After the Restoration the control of the press was reasserted by the government in the licensing act of 1662, which was continued by successive renewals until 1679. During this period authors and printers were prosecuted and works themselves were burned.<sup>21</sup> The licensing act was not renewed in 1679, and from that date until the accession of James II in 1685, there were no press laws. But by reason of the rigid enforcement of the common law of seditious libel the press was still held in check. The judges declared it to be a crime to print anything about the government without a royal license. Upon the accession of James II in 1685, the licensing act was renewed and was continued

<sup>18</sup> TASWELL LANDMEAD, ENGLISH CONSTITUTIONAL HISTORY 594.

<sup>19</sup> 28 Eliz., Ch. 2.

<sup>20</sup> "And though all the winds of doctrine were let loose to play upon the earth, so Truth be put in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to worse, in a free and open encounter? \* \* \* Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." MILTON, AREOPAGITICA.

<sup>21</sup> *Supra*, n. 18.

*FREEDOM OF THE PRESS UNDER OUR CONSTITUTIONS* 35

in force until it finally expired in 1695.<sup>22</sup> The Commons refused to renew it in 1695, and from that date there has been no press censorship in England. However the people at large were slow to recognize that freedom of the press was the foundation of all their liberties. Even during the Revolution of 1688, that brought an end to the tyranny of the Stuarts and established a new succession based upon the consent of the people, the importance of securing the freedom of the press was not yet understood. Here and there has risen some champion of the freedom of the press, such as Milton, Erskine or Alexander Hamilton,<sup>23</sup> but in the long history of the emancipation of the press the people have played a very small part.

The passing of the censorship was followed, in the reign of Queen Anne, by the rapid development, in dignity and political and literary importance, of the periodical press. Newspapers multiplied and such writers as Addison, Steele, Swift, and Defoe entered the field of journalism. From 1712 to 1855 a heavy tax was laid upon periodicals and proved effective as a check upon the press.

But the most powerful instrument employed by the government during the eighteenth century for the suppression of freedom of the press was the law of libel. It was in some of the most famous of these trials during the reign of George II that the ability and eloquence of Thomas Erskine were enlisted in behalf of the rights of juries in libel cases. Though the judges decided against him, among them Lord Mansfield, in 1792 the principles for which he contended were embodied in the famous Fox's Libel Act.<sup>24</sup> This statute took the power to control the press from the government and gave it to the jury. They were allowed to render a general verdict covering the law and facts. As Mr. Dicey has said, "Freedom of discussion is in England little else than the right to write or say anything which a jury consisting of twelve shopkeepers think it expedient should be said or written."<sup>25</sup> Provisions embody-

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<sup>22</sup> MACAULEY, 3 HISTORY OF ENGLAND 374. It is usually stated that the act expired in 1694.

<sup>23</sup> See VEEDER, LEGAL MASTERPIECES.

<sup>24</sup> BUCKLE, HISTORY OF CIVILIZATION 349; GREEN, HISTORY OF THE ENGLISH PEOPLE 817.

<sup>25</sup> DICEY, LAW OF THE CONSTITUTION (4th ed.) 235.



ing the principles of this act have been inserted in our federal and state constitutions.<sup>26</sup>

It is interesting to notice at this time that some of our most eloquent champions of the right of free discussion were careful to make it clear that there were some classes of people who should not be entitled to exercise this right. Thus Milton in his famous essay, "*Areopagitica*," would exclude the papists; and Erskine would exclude the religious heretics.<sup>27</sup> This privilege was not a part of the English constitution, no mention being made of it in the Petition of Right (1628), or the Bill of Rights (1689), two great constitutional documents that are the direct forerunners of our own Bill of Rights. In fact until comparatively recent times, the right of public discussion so far from being free, was very narrowly restricted.

The English settlement of America took place at a time when the prosecution of the press in England was at its height, and in the American colonies, from the beginning, the English and local governments restricted the liberty of the press. The first printing press was set up in Massachusetts in 1639 but was little used until 1849, when the magistrates were compelled by public opinion, to permit the publication of the laws.<sup>28</sup> In 1662 the general Court of Massachusetts appointed two licensors and prohibited the publication of anything not approved by them. We find Governor Berkeley of Virginia, in 1671, thanking God "there are no free schools or printing."<sup>29</sup> The prohibition of all printing except by license was in full force in Virginia, Massachusetts and New York. In fact the requirement of a previous license for publication persisted in Massachusetts for more than a score of years longer than in England, having been abolished only in 1719.<sup>30</sup> The King on being notified of the arrest of the unlicensed publisher of the Virginia laws in 1682 forbade the further publication of such laws.<sup>31</sup> He instructed the next governor in 1684, that no one should use a printing press in Virginia. From 1683 to 1729 no printing was allowed in Virginia, and from

<sup>26</sup> See the CONSTITUTION OF THE UNITED STATES, amendments V and VII; CONSTITUTION OF WEST VIRGINIA, Art. III, §10.

<sup>27</sup> 70 CENT. L. J. 189.

<sup>28</sup> COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed.) 601.

<sup>29</sup> 2 WATSON, CONSTITUTION 1400.

<sup>30</sup> 4 HARV. L. REV. 379.

<sup>31</sup> 1 HILDRETH, HISTORY OF THE UNITED STATES 561.

*FREEDOM OF THE PRESS UNDER OUR CONSTITUTIONS* 37

1729 to about 1765 there was only one press in the colony and this was largely controlled by the governor. The first newspaper in Virginia, the "Virginia Gazette," was established in 1736. The first newspaper published in America by Benjamin Harris, entitled "Public Occurrences Foreign and Domestick," in Boston, 1690, was suppressed after the first issue. The first printer in Pennsylvania was William Bradford, who is noteworthy also as perhaps the first champion of the freedom of the press in the New World. In 1691 he was arrested for seditious libel, tried in 1692, and conducted his own defense, arguing with power that the jury should be the judge not only of the fact of printing but also as to the character of the publication as libellous or otherwise, thus anticipating the memorable contention of *Ersine* by one hundred years. The jury disagreed but Bradford was released and moved to New York where he set up the first printing press in the province and served as royal printer for fifty years.

But the emancipation of the press in the colonies was near at hand. In 1735 one Zengler was prosecuted in New York, at the instance of the governor for seditious libel. Andrew Hamilton, a noted Philadelphia lawyer, who defended him offered to prove the truth of the charge printed, but the court refused to admit the evidence. Thereupon Hamilton boldly turned to the jury and said:

"We appeal to you for witnesses of the facts. The jury have the right to determine both the law and the fact and they ought to do so. The question before you is not the cause of a poor printer, nor of New York alone; it is the cause of liberty, the liberty of opposing arbitrary power by speaking and writing the truth."

The jury brought in a verdict of not guilty.<sup>32</sup>

This was the last serious attempt, in the colonies, to curb the press, which later became a powerful influence in promoting the Revolution and the adoption of the constitution. It was declared in the Virginia Bill of Rights of 1776 that "the freedom of the press is one of the great bulwarks of liberty, that can never be restrained but by despotic governments." Similar provisions were inserted in the first constitutions of other states. But in the Federal

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<sup>32</sup> Great American Lawyers: Sketch of Andrew Hamilton.

Constitutional Convention a proposal to insert in the Constitution a declaration that "the liberty of the press shall be inviolably preserved," was rejected on the ground that it was unnecessary because the power of Congress does not extend to the press. The omission was supplied however by the First Amendment, which provides among other things, that "Congress shall make no law \* \* \* abridging freedom of speech or the press."

After this the Alien and Sedition acts were passed during the excitement of the impending war with France in 1798. These statutes were aimed especially at the large number of foreigners who were then actively opposing the government. There were no prosecutions under the Alien Act, but there were a number under the Sedition Act.<sup>33</sup> The statute was challenged as void under the first amendment but was sustained by the trial court, the cases never reaching the supreme court. The statute is mild enough and would now almost certainly be sustained; but it was then against the temper of the times. The two statutes called forth the Virginia and Kentucky resolutions, and would undoubtedly have been repealed but they soon expired by their own terms, the Alien Act in 1800, and the Sedition Act in 1801.<sup>33a</sup>

The last prosecution for political libel in this country occurred in 1804. One Henry Crosswell published a libel on Jefferson. The trial court refused to allow him to prove the truth of the charge and charged the jury that they were to find only the facts and not the general question of guilt. The case was taken to the Supreme Court of the state, where Alexander Hamilton appeared for the defendant. The Supreme Court was equally divided in opinion, and the case went against the defendant, but shortly afterwards the state legislature passed a statute embodying the principles contended for by Hamilton, that the truth

<sup>33</sup> Reports of the trials of Lyon, Cooper, Haswell and Callender, under the Sedition Act, will be found under the appropriate titles in Federal Cases; and in Wharton's State Trials at pp. 333-659-684 and 688 respectively.

<sup>33a</sup> "I have sworn upon the altar of God eternal hostility against every form of tyranny against the mind of man."—Thomas Jefferson.

Jefferson's first official act after becoming president was to pardon all offenders and remit all fines imposed under the Sedition Act of 1798. HALE, LAW OF THE PRESS 282, n. 12.

<sup>34</sup> *People v. Crosswell*, 3 Johns. (N. Y.) 337 (1804). In this case Hamilton gave a definition of the law of libel which was adopted by Chancellor Kent as comprehensive and accurate and has since been repeated by hundreds of writers and judges, that is, "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy or individuals." Italics ours.

may be offered in evidence and that the jury are the judges of both law and facts, and the defendant was given a new trial. The truth may be pleaded in justification in West Virginia.<sup>35</sup>

There is little to record concerning seditious libel or any other aspects of the development of the freedom of the press from 1804 to 1917, as the government paid little attention to the vituperative attacks of the press and pamphleteers until the passage of the so-called Espionage Act of 1917, and the noteworthy Seditious Libel Amendment thereto in 1918.<sup>36</sup> This brings us to a consideration of the meaning of liberty of the press under our constitutions as defined by our legislatures, courts, and juries today.

"Congress shall make no law \* \* \* abridging freedom of speech or of the press."<sup>37</sup> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."<sup>38</sup> Other state constitutions contain similar provisions.<sup>39</sup> The only substantial variation in wording is found in the West Virginia Constitution which provides:

"No law abridging freedom of speech or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery in civil actions, by the aggrieved party, of suitable damages for such libel or defamation."<sup>40</sup>

Although the Federal Constitution does not specifically provide that every person shall be responsible for the abuse of the liberty granted, it "has invariably been subjected to a limitation similar to that expressed in the state Constitutions."<sup>41</sup>

How far do these constitutional guaranties leave the press unfettered? Clearly the individual is entitled to the largest measure of liberty of utterance that is consistent

<sup>35</sup> WEST VIRGINIA CONSTITUTION, Art. III, §2.

<sup>36</sup> HALE, LAW OF THE PRESS 283.

<sup>37</sup> U. S. CONSTITUTION, Amendment I.

<sup>38</sup> CONSTITUTION OF ILLINOIS, Art. II, §4.

<sup>39</sup> For a detailed analysis and summary of the provisions in the various states see STIMSON, FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES 144-145.

<sup>40</sup> CONSTITUTION OF WEST VIRGINIA, Art. III, §7.

<sup>41</sup> HALE, LAW OF THE PRESS 273. The author in discussing this subject says: "The effect of these provisions is to render any statute passed in conflict therewith void; the provision of the Federal Constitution applying only to acts of Congress and the state constitutional provisions to acts of the states."

with the well-being of society as a whole.<sup>42</sup> When the individual passes beyond that line liberty becomes license and abuse.<sup>43</sup>

The writer believes that it is a safe conclusion that the amount of liberty which the press enjoys depends on public opinion. Over a century before, Hamilton realized this when he wrote:

"What is the liberty of the press? Who can give it any definition that would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in *any* constitution respecting it, *must altogether depend on public opinion*, and on the general spirit of the people and the governments. And here, after all, \* \* \* must we seek for the only solid basis of *all* our rights."<sup>44</sup>

Blackstone defined freedom of the press as consisting

"In laying *no previous restraint* upon publications, and not in freedom from censure for criminal matter when published."<sup>45</sup>

However, this generalization has been shown to be too broad in that it fails to provide for the use of the injunction in certain cases: as where the act of publication results in intimidation and coercion, and is treated as crime, or where there is a publication in aid of a boycott. It is unsound for the further reason that it illogically ignores freedom of speech, partner in the guaranty with liberty of the press. Nor does it account for modern censorship. Neither is it involved in that large class of cases holding that statutes prohibiting publications which affect injuriously the public welfare, do not invade the constitutional right of freedom of the press.<sup>46</sup> The unsoundness of this definition will

<sup>42</sup> HALE, LAW OF THE PRESS 274.

<sup>43</sup> *Rex v. Burdett*, 4 B. & Ald. 95, 132 (1820). The court said: "Where vituperation begins, the liberty of the press ends. \* \* \* The liberty of the press allows us to persuade men to use their constitutional influence over their representatives to obtain, in the regular parliamentary manner, a redress of real or supposed grievances. But this must be done with temper or moderation, otherwise instead of setting the government in motion for the people, the people may be set in motion against the government."

<sup>44</sup> Italics ours.

<sup>45</sup> Similarly, Treitschke, looking at the subject from the standpoint of government, after examining possible modes of state control of the press, observes, "We must, unfortunately, come to the conclusion that in a free state a better appreciation of moral values on the part of the public is the only way in which an unworthy press can be made to reap the contempt which it deserves." 5 VA. L. REV. 244-5.

<sup>46</sup> 4 BLACKSTONE'S COMMENTARIES, 151.

<sup>47</sup> 2 MINN. L. REV. 251. Examples of such statutes declared to be valid are: Those penalizing utterances or publications tending to encourage commission of crimes. *People v. Most*, 171 N. Y. 423, 64 N. E. 175 (1902). Those designed to prevent or hinder enlistment in the military forces of the United States or of the state. *United States v. Pierce*, 245 Fed. 878 (1817); *State v. Holm*, 139 Minn. 267, 166 N. W. 181 (1918).

## FREEDOM OF THE PRESS UNDER OUR CONSTITUTIONS 41

be considered further in connection with a discussion of the use of the injunction and *modern censorship* as restraints on the liberty of the press.

It is submitted that the court in *People v. Most*<sup>47</sup> by a negative process gave about as accurate an interpretation of the meaning of liberty of the press as the nature of the subject will admit, when it said:

"It [the liberty of the press] does not deprive the state of the primary right of self-preservation. It does not sanction unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn as not sanctioned by the constitution of *any* state, appeals, designed to destroy the reputation of the citizen, the peace of society or the existence of the government."<sup>47a</sup>

The court in *Coleman v. McLennan*,<sup>48</sup> was not far wrong when it said:

"'Liberty of the press' is still an undefined term, and, like some other familiar phrases of constitutional law, must remain undefined. Certain boundaries are fairly discernible within which liberty must [may] be displayed, but precise rules cannot be formulated in advance to govern its exercise on particular occasions. In the decision of controversies, the character, the organization, the needs and the will of society at the present time must be given due consideration."

It is submitted that the view presented here shows a proper legal conception of some of the more important considerations which should enter into any interpretation of constitutional liberty of the press.<sup>49</sup>

It is a safe conclusion that most of the authorities quoted from above agree that most restrictions on the liberty (or perhaps we should say the abuse of the liberty)

<sup>47</sup> *Supra*, n. 46.

<sup>48</sup> 78 Kan. 711, 98 Pac. 231 (1908).

<sup>49</sup> Paterson said: "The liberty of the press means the liberty of publishing whatever any member of the public thinks fit on any subject, *without any preliminary license or qualification whatsoever*, and subject only to this restriction: 'That if he goes to an extreme in making blasphemous, immoral, seditious or defamatory statements, *then he may be punished afterwards* by indictment, information, or by action for such excess.'" PATERSON, LIBERTY OF PRESS, SPEECH AND WORSHIP 38. To substantially the same effect see STORY'S COMMENTARIES ON THE CONSTITUTION §1874. These interpretations, apparently, are open to the same criticism which was made of Blackstone's definition, in that they imply that liberty of the press within the meaning of the First Amendment prohibits all previous restraints. It is submitted that freedom of the press under our constitutions does not and never was intended to include liberty of publication "without any qualification whatsoever." Italics ours.

of the press are to be found in the *present* definition and punishment of the common law crimes of blasphemous, obscene, defamatory and seditious libel.<sup>50</sup> When we add to this a consideration of the legal meaning and scope of privilege, fair comment, contempt proceedings, the use of the injunction, certain species of quasi-censorship (including the exclusion of publications from second class mailing privileges and censorship of the movies) and divers indirect methods of controlling the press, it is submitted that the nature of the subject will not admit of a much more accurate delineation or conception of the scope of the freedom of the press which we enjoy under our constitutions. Therefore your attention is now directed to this vital phase of the problem.

The limits of this discussion will prevent anything more than a consideration in a general way, of the meaning and present legal status of the above mentioned factors. While it is understood that the common law principles which touch and concern many of these matters, for the most part at least, are settled and familiar to the average lawyer, it is assumed that a brief sketch covering the more fundamental of them with reference to pertinent constitutional and statutory provisions, and the interpretations placed upon them, will be of sufficient assistance to a better understanding of our problem to justify a brief digression for that purpose.

In the case of *Regina v. Ramsey and Foote*,<sup>51</sup> Lord Coleridge adopts Mr. Starkie's statement of the law of blasphemous libel, the vital part of which reads as follows:

"A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention in law, as well as morals—a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong."

In the same opinion Lord Coleridge says:

"If the law as I have laid it down to you is correct—if the decencies of controversy are observed, even the

<sup>50</sup> HALE, THE LAW OF THE PRESS 274; 2 MINN. L. REV. 250-251.

<sup>51</sup> 15 Cox C. C. 23 (1883).

## FREEDOM OF THE PRESS UNDER OUR CONSTITUTIONS 43

fundamentals of religion may be attacked without a person being guilty of blasphemous libel. There are many great and grave writers, who have attacked the foundations of Christianity. Mr. Mill undoubtedly did so; but no one can read their writings without seeing the difference between them and the incriminated publications, which I am obliged to say is a difference not of degree but of kind. There is a grave, an earnest, a reverent, I am almost tempted to say, a religious tone in the attacks on Christianity itself, which show that what is aimed at is not insult to the opinions of the majority of Christians, but a real, quiet, honest pursuit of truth. \* \* \* \* With regard to many of these persons therefore, I should say that they were within the protection of the law. \* \* \* \* I think it \* \* \* a good law that persons should be obliged to respect the opinions of those amongst whom they live."

It is believed that this statement of the law of blasphemous libel embodies a proper position with regard to it, in that it points out the true boundaries between an honest search for the truth of religion within the law, and a destructive attitude of ridicule, contempt and scorn toward those sacred beliefs which form some of the strongest safeguards of the welfare of society, and which the law (always a jealous mistress) protects from the evil incident, in this field of law, to an unwarranted abuse of liberty. Cooley agrees with this view.<sup>52</sup> The West Virginia Constitution seems to be in accord with the position taken above by providing that:

"All men shall be free to profess, and by argument, to maintain their opinions in matters of religion; and the same shall, in no wise, affect, diminish or enlarge their civil capacities."<sup>53</sup>

It should be noted in passing that it seems to be admitted that blasphemy was punishable at common law principally because it tended directly to a breach of the peace.<sup>54</sup> Here again public opinion will decide when discussion concerning religion must, in the interest of the general welfare,

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<sup>52</sup> Cooley says: "Blasphemy implies something more than a denial of any of the truths of religion, even of the highest and most vital. A bad motive must exist; there must be a wilful and malicious attempt to lessen men's reverence for the Deity, or for the accepted religion. A malicious and mischievous intention is \* \* \* the broad boundary between right and wrong \* \* \* Legal blasphemy implies that the words were uttered in a wanton manner, 'with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion.'" COOLEY, CONSTITUTIONAL LIMITATIONS, 670-3 and authorities cited.

<sup>53</sup> CONSTITUTION OF WEST VIRGINIA, Art. III, §15.

<sup>54</sup> See 8 C. J. 1119 and authorities cited.



be held to fall outside of the protection of the constitutional guaranty of freedom of the press.

The publication of obscene and indecent writings is made criminal by both common and statute law.<sup>55</sup> State statutes generally condemn them and an act of congress renders them non-mailable.<sup>56</sup> The West Virginia Constitution provides that "the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers or pictures."<sup>57</sup> Under this provision the West Virginia Legislature enacted the following statute:

"If a person import, print, publish, sell or distribute any book or other thing containing obscene language, or any print, picture, figure or description manifestly tending to corrupt the morals of youth, or introduce it into any family or place of education, he shall be confined in jail not more than one year and fined not to exceeding two hundred dollars."<sup>58</sup>

It will be observed that this is a sweeping statute and would sustain almost any sort of prosecution initiated within its scope if it is not properly construed and limited by our courts in conformity to the spirit and purposes of the fundamental law.

Federal statutes<sup>59</sup> have been construed to make the mailing of obscene letters, though sealed, unlawful.<sup>60</sup> These statutes are not an unconstitutional abridgment of freedom of speech or of the press.<sup>61</sup> The same is true of the mailing of lottery circulars.<sup>62</sup> As the court in *United States v. Harmon* has tersely said, "the aggregate sense of the community" must determine the propriety of any legislation on this subject.<sup>63</sup> The necessity and reasonableness of legisla-

<sup>55</sup> *Rex v. Wilkes*, 4 Burr. 2527 (1770); *Rex v. Curl*, 7 Strange 788 (1727).

<sup>56</sup> HALE, LAW OF THE PRESS, 293.

<sup>57</sup> CONSTITUTION OF WEST VIRGINIA, Art. III, §8.

<sup>58</sup> BARNES' W. VA. CODE, 1923, Ch. 149, §11.

<sup>59</sup> U. S. REV. STATUTES §3893 (1888).

<sup>60</sup> *United States v. Gaylord*, 50 Fed. 410 (1883); *United States v. Martin*, 50 Fed. 918 (1892); *United States v. Andrews*, 58 Fed. 861 (1893).

<sup>61</sup> *United States v. Harmon*, 45 Fed. 414 (1891); *Harman v. United States*, 50 Fed. 921 (1892).

<sup>62</sup> *In re Jackson*, 96 U. S. 727, 24 L. ed. 377 (1877). It is generally held that the question of obscenity in a particular publication is for the jury and not for the court. *U. S. v. Bennett*, 16 Blatchf. 338 (1879); *U. S. v. Clark*, 38 Fed. 500 (1899); *People v. Muller*, 96 N. Y. 408 (1884). Where the publication is manifestly obscene the defendant's motive in publishing it is immaterial. *U. S. v. Harmon*, *supra*; *U. S. v. Bennett*, *supra*. But the purpose for which a book is published may have a bearing upon the question whether or not it is indecent, as for example, books published for scientific and medical purposes, which would be indecent and obscene for purposes of general circulation. *U. S. v. Harmon*, *supra*; *U. S. v. Clark*, *supra*.

It has been suggested that if the existing test prevents the publication of writings of educational value, the remedy is open through the legislature, for the Constitution only prevents restrictions upon, and not enlargements of, the rights to publish.

<sup>63</sup> *United States v. Harmon*, *supra*.

*FREEDOM OF THE PRESS UNDER OUR CONSTITUTIONS* 45

tion against obscene publications is well stated by the court, in this case, in the following language:

"To the pure all things are pure is too poetical for the actualities of practical life. There is in the popular conception and heart such a thing as modesty \* \* \* \* It was born in the Garden of Eden. After Adam and Eve ate of the fruit of the tree of knowledge they passed from that condition of perfectibility which some people nowadays aspire to, and their eyes being opened, they discerned that there was both good and evil; 'and they knew they were naked, and they sewed fig leaves together, and made themselves aprons.' From that day to this civilized man has carried with him the sense of shame, \* \* \* the feeling that were some things on which the eye—the mind should not look \* \* \* and where men and women became so depraved by the use, or so insensate by perverted education, that they will not veil their eyes, nor hold their tongues, the government should perform the office for them in protection of the social compact and the body politic."

While overzealous or overnice people may attempt undue interference with publications which are not condemned by people of average sentiment and thus discredit the law in popular estimation, and on the other hand people of coarse mind or impure character may condemn the law as an unwarrantable interference, the "aggregate sense of the community" must determine what is obscene or indecent in the same way that it is in the final event the test of all questions of reasonableness or propriety.

There is no doubt that the tendency of the press of this country is to publish sensational and often false accounts of individual wrongs and immoralities, and even while deprecating this, urge that competitive necessity requires that they give the public these things because it wants them. Unless we are going to allow the commercial idea to pander to the immoral, these publications should be suppressed under the general police power of the state,<sup>64</sup> because the slight social value which they have in the exposition of ideas and as a step toward the truth is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see.<sup>65</sup> The jury may be said to generally fairly repre-

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<sup>64</sup> 58 CENT. L. J. 384.

<sup>65</sup> CHAFEE, *FREEDOM OF SPEECH* 170.

sent "the aggregate sense of the community." So we may safely commission them under the direction of the court to draw the line where decency ends and obscenity begins.

Civil libel or defamation is not protected by the constitutional guaranty of a free press.<sup>65</sup> According to the generally accepted definition defamation consists in a malicious writing or printing, brought to the notice of a third person, which tends either to blacken the memory of one who is dead or the reputation of one who is alive and expose him to public hatred, contempt or ridicule, either by (1) imputing to him the commission of a crime, (2) tending to injure him in his office, profession, calling or trade, or (3) by holding him up to scorn, ridicule or contempt whereby he is impaired in the enjoyment of general society.<sup>67</sup> Thus it is defamation to charge a man with being a thief, to charge an attorney with "sharp practice," to charge an official with graft, and to charge a woman with incontinency; but it is not defamation to charge a candidate for office with impoliteness or lack of party principles, or to use the portrait and name of a person to advertise a patent medicine. However this last situation has given rise to much discussion under the so-called right of privacy. The Georgia court allowed recovery in a similar case, but the majority of courts hold otherwise.<sup>68</sup>

Defamation is a criminal as well as a civil wrong. Apart from rules as to publication, criminal libel differs from civil libel only in that the latter is confined to the defamation of a living person, whereas criminal libel includes a deceased person as well. The reason for this distinction is that the objective in civil libel is the award of damages as compensation to the injured person, while the law of criminal libel is concerned with the preservation of the peace.<sup>69</sup>

The courts have revised Hamilton's definition of the liberty of the press in the ordinary law of libel as stated in the *Croswell Case*, so as to read—"liberty of the press

<sup>65</sup> COOLEY, CONSTITUTIONAL LIMITATIONS 604; *Sweeney v. Baker*, 13 W. Va. 182 (1878). See also 32 L. R. A. 881.

<sup>67</sup> NEWELL, SLANDER AND LIBEL 67. Observe that this definition includes both criminal and civil defamation.

<sup>68</sup> 4 N. CAR. L. REV. 27; *Pavesick v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101 (1905); 4 HARV. L. REV. 193.

<sup>69</sup> Thus within recent years it was held that a scurrilous attack on the character of George Washington was a criminal libel. *State v. Haffer*, 94 Wash. 136, 162 Pac. 45 (1917).

## FREEDOM OF THE PRESS UNDER OUR CONSTITUTIONS 47

and freedom of speech is a privilege to publish with impunity a falsehood on matters of public concern in the honest belief that it is a true statement with good motives for justifiable ends." So we see that at the time of the adoption of the Constitution liberty of speech and the press meant the right to publish, with impunity, truth on matters of public concern without more, and that under the revised form its meaning has been greatly extended. The Constitution of West Virginia provides for the punishment of defamatory libel, and the recovery of suitable damages in civil actions.<sup>70</sup> The truth, published with good motives and for justifiable ends, is a complete defense in prosecutions and civil suits for libel in West Virginia.<sup>71</sup>

Under certain circumstances privilege and the right to comment furnish justification for defamatory utterances. Privilege is of two kinds, absolute and conditional. Judges, counsel, members of state legislatures and of Congress, while in the discharge of their duties are granted absolute immunity for all defamatory utterances, on the ground that it is considered sound public policy to send such individuals upon such occasions to their tasks, unhampered by any lurking fear that they later may be called to account for what they say. Reports of legislative, judicial and other public proceedings are conditionally privileged. They are allowed so long as they are fair, true and free from malice.<sup>72</sup> Speaking of conditional privilege in reference to judicial proceedings, Mr. Justice Holmes said:

"It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."<sup>73</sup>

Matters of public concern are the legitimate subject of fair and honest comment and criticism. The criticism must

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<sup>70</sup> CONSTITUTION OF WEST VIRGINIA, Art. III, §7.

<sup>71</sup> CONSTITUTION OF WEST VIRGINIA, Art. III, §8. It is worthy of notice that we have a statute in West Virginia making insulting words actionable as a breach of peace. BARNES' W. VA. CODE, 1923, c. 103, §2.

<sup>72</sup> HALE, LAW OF THE PRESS 90-91; 4 N. CAR. L. REV. 30; COOLEY, CONSTITUTIONAL LIMITATIONS 629 *et. seq.*

<sup>73</sup> Cowley v. Pulsifer, 137 Mass. 392 (1884).

relate to a matter of public concern, such as books offered to the public and plays publicly performed, and not to a matter which is purely private. The criticism must be the honest opinion of the critic and not prompted by personal malice. It must be directed against the public work, performance or conduct and not against the individual as such. It is comment or expression of opinion, and not misstatement of fact, that is permitted. It is submitted that the following statement of the reasons for the rule, by Mr. Hale, are sound:

"The actor, the artist and the author submit their professional work to the public, and thereby appeal to the public for support and approval.' Having made this appeal to the public, the person cannot complain that the public proceeds to pass judgment, so long, at least, as it is honest and fair. Moreover a good critic is a public benefactor. The services that he is able to render justify according to him some privileges and immunities. 'The critic does a great service to the public, who writes down any rapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents the people from wasting their time on trash.' "

Comment must be distinguished from the reports of judicial proceedings, since the former is not privileged.<sup>75</sup>

Sometimes comment may degenerate into contempt of court, and as such, not being within the protection of the constitutional guaranty, it is another limitation on the freedom of the press. Bishop says that:

"According to the general doctrine, any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt."<sup>76</sup>

Contempt may be direct, that is, such as is committed in the presence of the court, or indirect, that is, such as is not committed in the presence of the court and in the latter instance the offender must be brought in by process. The

<sup>75</sup> HALE, LAW OF THE PRESS 130-131.

<sup>76</sup> *Brown v. Providence Telegram Pub. Co.*, 25 R. I. 117, 54 Atl. 1061 (1903).

<sup>77</sup> BISHOP, CRIMINAL LAW §216. See also *People v. Wilson et al.*, 64 Ill. 105 (1872), where the rule is laid down that publications are a contempt when they are calculated to impede, embarrass or obstruct the administration of justice.

## FREEDOM OF THE PRESS UNDER OUR CONSTITUTIONS 49

court may punish both forms by summary proceedings.<sup>77</sup> In *Haskell v. Faulds*, the court held that while anyone has the right to comment on judicial decisions and the fitness of the judges who render them, if he attempts, by defamatory publications, to degrade judicial tribunals, he is guilty of an abuse of the liberty of the press.<sup>78</sup> It is submitted that the court in this case has accurately defined the limits of the power of the courts to punish for contempt.

In another connection it was intimated that Blackstone's theory that freedom of the press meant freedom from all previous restraints was not tenable. In no place is this more clearly shown than in the use the courts have made of the injunction in granting equitable relief against defamation and injuries to personality.<sup>79</sup> There is authority for the position that the common law theory was that equity would not interfere to enjoin a threatened publication of a libellous nature.<sup>80</sup> It has been shown that this refusal has been based upon one or more of three grounds. First, equity protects property interests only, not interests of personality. Second, it would be a denial of the right of trial by jury. Third, it would be a species of previous restraint, prohibited by the Blackstonian theory.<sup>81</sup>

However the courts have been far from consistent in their adherence to this theory, and in their reasons for so doing. In *Brandreth v. Lance*, the threatened publication being clearly a libel on the plaintiff and an injury to personality only, the court sustained a demurrer to the bill, applying the Blackstonian theory and the doctrine that equity does not protect interests of personality. Dean Pound shows that of the three doctrines as to the scope of liberty of publication advanced by Blackstone, Story and

<sup>77</sup> COOLEY, CONSTITUTIONAL LIMITATIONS, 463, n. 2.

<sup>78</sup> *Haskell v. Faulds*, 17 Mont. 140, 42 Pac. 85 (1895). Quoting with approval from another decision, the court in the *Haskell* Case said: "Any citizen has the right to publish the proceedings and decisions of this court, and, if he deem it necessary for the public good, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important public trusts reposed in them; but he has no right to attempt, by defamatory publications, to degrade the tribunal, destroy public confidence in it, and dispose the community to disregard and set at naught its orders, judgments, and decrees. Such publications are an abuse of the liberty of the press, and tend to sap the very foundation of good order and well-being in society, by obstructing the course of justice. If a judge is really corrupt and unworthy the station which he holds, the Constitution has provided an ample remedy, by impeachment or address, where he can meet his accuser face to face, and his conduct may undergo a full investigation."

<sup>79</sup> See the admirable treatment of this subject by Dean Pound of Harvard Law School in 29 HARV. L. REV. 640; 28 HARV. L. REV. 343, 354, and 359.

<sup>80</sup> *Brandreth v. Lance*, 8 Paige (N. Y.) 24 (1839).

<sup>81</sup> 29 HARV. L. REV. 648 *et seq.*

Cooley, only Blackstone's would justify the position taken in *Brandreth v. Lance*, and that it is unsound for if all penalty may be imposed upon the publisher after the act, its effect will be to impose an indirect censorship and evade the guarantee. He says:

"Blackstone's doctrine has usually been criticized as not going far enough in securing against imposition of liability after publication upon arbitrary and unreasonable grounds. Equally it goes too far in denying to the law all power of restraint before publication. Although its best title to consideration is in the history of the subject, it goes beyond what history indicates as the main purpose, namely, a freedom from a regime of general censorship and license of printing."

The United States Supreme Court announced Blackstone's doctrine in *Patterson v. Colorado*.<sup>82</sup> But the same court upheld *previous restraint* upon publication when incidental to enjoining an unlawful boycott.<sup>83</sup> This is a good example of the class of decisions which allow an injunction where the writing or publication is part of a wrong which would be enjoined of itself. In other words Blackstone's view as to liberty of publication is not tenable here as the ground of denying relief and the main argument in *Brandreth v. Lance* is put out of the way.

Dean Pound approves of three classes of cases wherein equity in truth secures personality, although purporting to secure substance only. First, there are cases of publication in violation of contract or of trust. Here the theory is that the beneficial interest in the trust res or contract right is an asset to be protected. But in reality the substantial interest secured is generally one of personality. Second, there are cases involving private letters. Here relief is granted to protect against invasion of privacy since the property interest involved is practically a fiction. Third, there are the cases of wrongful expulsion from social clubs where the real wrong complained of is the humiliation and injury to feelings. There is also a group of related cases where the jurisdiction of equity has been invoked to protect an individual interest in a domestic relation; as where the defendant assumed the plaintiff's name and lived with

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<sup>82</sup> 205 U. S. 455, 462 (1907).

<sup>83</sup> *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 437 (1911).

the latter's husband;<sup>84</sup> and in the case where the mother of a child born in adultery was enjoined from claiming for the child the status of a lawfully begotten child of the plaintiff.<sup>85</sup> Thus we see equity does protect interests of personality.

Even though it is admitted that there is a clear policy in favor of jury trial of an issue of truth in a charge of defamation, where it is admitted that the publication is false, or where the falsity is so clear that there is really nothing for a jury to try, the policy in question should not stand in the way of an injunction. The English case of *Dixon v. Holden*<sup>86</sup> seemingly sustaining jurisdiction in equity in such cases as these, represents the present trend of American authority, although the cases of *Boston and Diatite Company v. Florence Mfg. Company*,<sup>87</sup> and *Prudential Assurance Company v. Knott*,<sup>88</sup> holding the contrary view, have exercised a controlling influence in the United States in the past. As Dean Pound says:

"In England now this subject has the very same development as equity jurisdiction over trespass, over disturbance of easements, and over nuisance. American courts are moving in the same direction, reaching such cases indirectly by laying hold of some admitted head of equity jurisdiction and tacking thereto what is in substance a concurrent jurisdiction over legal injuries through publication \* \* \* At any rate so long as denial of relief in such cases rests on no stronger basis than authority our courts will find a way out."<sup>89</sup>

It is suggested that these injunction cases well illustrate the unfortunate consequences of the application of the Blackstone theory. It would seem more reasonable to say that constitutional freedom of the press prohibits any other previous restraints than those that are necessary to the public welfare, thus leaving the courts free to exercise their equity powers in accordance with settled principles of justice.<sup>90</sup>

Though it is true, as we have seen, that when equity, in so-called exceptional cases, enjoins the issuance of a publi-

<sup>84</sup> *Hodecker v. Stricker*, 39 N. Y. S. 515 (1896).

<sup>85</sup> *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97 (1907).

<sup>86</sup> 7 Eq. 488 (1889).

<sup>87</sup> 114 Mass. 69 (1873).

<sup>88</sup> 10 Ch. App. 142 (1875).

<sup>89</sup> 29 HARV. L. REV. 662 *et seq.*

<sup>90</sup> See 2 MINN. L. REV. 253-255.



cation, there is some other element which gives jurisdiction, such as the menace of intimidation or crime, the fact remains that the First Amendment has to give way to allow previous restraints. What then becomes of the Blackstonian theory? The fact that a few early Federalist judges, due to their slavish adherence to English authorities held to this theory, should have little weight. Although Justice Holmes carried it into the Supreme Court in *Patterson v. Colorado*, he has since repudiated it in the *Schenck* and *Abrams* Cases.

Professor Chafee's observations on this theory are conclusive. He says:

"This Blackstonian theory dies hard, but it ought to be knocked on the head once for all. In the first place, Blackstone was not interpreting a constitution, but trying to state the English law of his time, which had no censorship and did have extensive libel prosecutions. Whether or not he did state that law correctly an entirely different view of the liberty of the press was soon afterwards enacted in Fox's Libel Act, so that Blackstone's view does not even correspond to the English law of the last hundred and twenty-five years."<sup>91</sup>

When we add to this the fact that this theory is inconsistent with the very nature of our elective, limited and responsible government as opposed to the dominantly hereditary government of Great Britain, we see why this view of the liberty of the press never has been really adopted in this country.<sup>92</sup> It is submitted that history, precedents and vital considerations of public policy are inconsistent with the notion that liberty of publication under our constitutions includes freedom from all previous restraints, even though it be conceded that the First Amendment was meant by its framers to ensure that which had already become the law, namely, that no preliminary license requirement should be imposed before publication. It will be observed that this vital difference between the removal of preliminary license requirements and removal of all restraints is the principal point of disagreement among commentators, writers and judges who discuss the Blackstonian theory and interpretations of the First Amendment.

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<sup>91</sup> CHAFEE, FREEDOM OF SPEECH 9.

<sup>92</sup> See 18 MICH. L. REV. 685.

The question as to whether the constitutional guaranties of a free press should be extended to give the motion picture industry protection against censorship does not seem to have given the courts much trouble. A series of cases decided that the constitutional guarantees did not extend to give protection against interference with the exhibition of the productions of this industry.<sup>93</sup> In these cases it was insisted that motion picture films were a part of the press, and that as no law could be passed to restrain the liberty of the press, no law could be passed to subject motion pictures to censorship before their public exhibition. In *Mutual Film Company v. Industrial Comm. of Ohio*, the court said:

"The first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the billboards of our cities and towns, and which regards them as emblems of public safety, \* \* \* and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion. The judicial sense supporting the common sense of the country is against the contention. \* \* \* It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as a part of the press of the country or as organs of public opinion. They are mere representatives of events, of ideas and sentiments, published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."

A censorship, then, reasonably related to the exhibition of films within a state, is within the police power of a State, and a statute so providing does not abridge our federal or state constitutional provisions safeguarding the freedom of the press.<sup>94</sup>

Another limitation on the constitutional guaranty of freedom of the press is the exclusion of printed matter

<sup>93</sup> *Mutual Film Co. v. Chicago*, 224 Fed. 101 (1915); *Mutual Film Co. v. Industrial Comm. of Ohio*, 236 U. S. 230 (1915); *Mutual Film Co. v. Hodge*, Gov. of Kansas, 236 U. S. 248 (1915).

<sup>94</sup> 2 VA. L. REV. 216, 218; 9 ILL. L. REV. 130.

from the mails by the postal authorities under governmental sanction. The United States Supreme Court has decided that this does not amount to an abridgment of the liberty of the press under our constitutions.<sup>95</sup> It has been held that a newspaper which carries advertising of a selling scheme, advertising or trade extension campaign, which violates the lottery laws may be excluded from the mails by the Post Office Department.<sup>96</sup> A federal statute makes obscene literature non-mailable.<sup>97</sup> The object of Congress in excluding these and various other articles from the mails, has not been to interfere with the liberty of the press, but to refuse its facilities for the distribution of matter deemed injurious to the public morals.<sup>98</sup>

Under the Espionage Act, in the case of *Masses Publishing Company v. Patten*,<sup>99</sup> Judge Hand granted an injunction to restrain the Postmaster of New York from denying second class privilege to *The Masses*. But the upper court reversed the decision on the ground that the publication was intended to interfere with the successful prosecution of the war.<sup>100</sup> Later the United States Supreme Court upheld the administrative action of Postmaster General Burleson in revoking the second class mailing privileges of the *Milwaukee Leader* on the ground that articles were constantly appearing in it which violated the Espionage Act.<sup>101</sup> Justices Brandeis and Holmes dissented, principally on the ground that there was no authorization to the postmaster to deny second class privileges with regard to future numbers of a paper because previous issues contained non-mailable matter. So while censorship seems to be prohibited under our constitutional guaranties the Postmaster General has been made a virtual censor in this indirect way. It is submitted that any appreciable extension of this power would amount to a violation of the constitutional guaranty. As it is the power should be lodged in some impartial tribunal.<sup>102</sup>

<sup>95</sup> *Ex parte Jackson*, *supra*.

<sup>96</sup> *Rast v. Dan Deman*, 240 U. S. 342 (1915).

<sup>97</sup> U. S. COMP. STAT. §10381 (1918).

<sup>98</sup> *Ex parte Jackson*, *supra*.

<sup>99</sup> 244 Fed. 535 (1917).

<sup>100</sup> 246 Fed. 24.

<sup>101</sup> *Milwaukee Social Democrat Pub. Co. v. Burleson*, 255 U. S. 407 (1920). Accord: *BURDICK, THE AMERICAN CONSTITUTION* 370.

<sup>102</sup> See 4. N. CAR. L. REV. 24, 31-38.

While the publishers of newspapers, magazines, and similar publications are protected by the constitutional guaranties to the same extent as the public at large, they enjoy no additional immunity and are responsible for the abuse of the right of free publication on the same principles as other persons.<sup>103</sup> Statutes prohibiting the publication and circulation of pernicious advertising constitute a lawful exercise of the police power and do not invade the constitutional guaranty.<sup>104</sup>

While the scope of this paper does not include a discussion of the control of the press by agencies other than the law, at present in this country, it is by such other agencies mainly that the press is or may be controlled. Thus the control of news distributing agencies or the influence of advertising patronage, may seriously abridge the liberty of the press. As one writer puts it: "He who pays the piper calls the tune." However the evil to be apprehended from these sources is largely neutralized by the multiplicity of periodicals, affording abundant opportunity for the presentation of all sides of any question.<sup>105</sup>

It will be recalled that at common law a man was not free to make false statements injuring the reputation of another although made with good intentions. However in the interest of the public welfare, utterances by such men as legislators and judges in the discharge of their duties, were held to be privileged. In other relations where the public interest was less deeply involved, communications were made subject only to a qualified privilege, being actionable only if proved to be malicious as well as false. It was about this doctrine of qualified privilege for the discussion of men and measures as applied to charges of seditious libel that the fiercest battles were fought and the most famous statements made about the freedom of speech and of the press. The reason for the gathering of the forces at this point will plainly appear, when it is noted that sedition is the name applied to certain efforts

<sup>103</sup> *Sweeney v. Baker et al*, *supra*; *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1906); 12 C. J. 953.

It will be observed that President Green of the West Virginia Supreme Court in the *Sweeney* Case says that "the liberty of the press consists in the right in the conductor of a newspaper to print whatever he chooses *without any previous license*" and *not without any previous restraint*. Italics ours.

<sup>104</sup> 35 A. L. R. 12, note; *HALE, LAW OF THE PRESS* Ch. 6.

<sup>105</sup> On this question see 56 AM. L. REV. 514; 5 VA. L. REV. 225, 245; 24 SURVEY 365.

to subvert or bring into contempt existing government, its officers, and its laws.<sup>106</sup>

The law of sedition had its origin in the natural disposition of a government to maintain itself. The severity of the law has naturally varied with the character of the ruler and the conception of government. Thus at common law it was indictable to publish anything against the constitution of the country, or the established system of government. The law always, however, allowed a temperate discussion of public events and measures.

In the United States, where the government is responsible to the people, one would expect to find more freedom in this particular. However, conceptions of the right of government to be free from criticism have been from the outset and still are unsettled in this country. Cooley expressed a doubt whether the common law principles on this subject would be considered to have been practically adopted in the American states.<sup>107</sup> Certainly no prosecutions could be maintained in the United States Courts for libels on the general government since there is no Federal common law, and there is now no statute, and never was except during the brief existence of the Sedition Law of 1798 and the recent wartime legislation, which assumed to confer any such power. The former, passed when the government was new and many men feared that heated party discussions might disrupt it, has had its constitutionality denied or questioned by Cooley,<sup>108</sup> Schofield, Jefferson, Madison, Calhoun, Tucker, Von Holst and Freund.<sup>109</sup> Bilke and Willoughby took the view that Congress might punish seditious libel.<sup>110</sup> However there was no effort to assert such a right after the prosecutions under the act of 1798 until the passage of the Espionage Act of 1917 and the Seditious Libel Amendment thereto in 1918. Though these were war time measures the agitation for peace legislation embodying some of their features make them of more than historical interest and value.

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<sup>106</sup> HALE, *LAW OF THE PRESS* 280.

As Paterson puts it: "A seditious libel, therefore, in its shortest definition, consists in 'any words which tend to incite people immediately to take other than legal courses to alter what the government has in charge.'" PATERSON, *LIBERTY OF PRESS, SPEECH AND PUBLIC WORSHIP* 81.

<sup>107</sup> COOLEY, *CONSTITUTIONAL LIMITATIONS* (7th ed.) 618.

<sup>108</sup> *Idem*.

<sup>109</sup> See 85 CENT. L. J. 62.

<sup>110</sup> *Idem*.

The Supreme Court of the United States has held all of the provisions of the Espionage Act of 1917, and paragraphs 3 and 5 definitely, and 1 and 2 apparently, of the Sedition Act of 1918, constitutional.<sup>111</sup> Your attention is directed to paragraphs 1 and 2 of the Sedition Act,<sup>112</sup> which, on their face, constitute the severest restriction upon freedom of speech and the press ever enacted in the United States. However the federal judges have, to some extent at least, ameliorated their harshness. The prosecutions under these acts have given rise to certain difficult and far reaching questions of construction.

One problem was to decide whether or not guilt was to be limited to those cases where there was a direct appeal to persons to violate the law, or was to include as well the use of the language the reasonable tendency of which was to produce such illegal conduct, and again on whether the remote or immediate tendency of the language to produce the evils aimed at was to be taken as a test. The courts have disagreed on this question.<sup>113</sup>

Mr. Justice Holmes, in the Debs Case, makes the "probable effect" of the language the test. And later, in sustaining the verdict of guilty in the Frohwerk Case, in the same vein he remarks:

"But we must take the case on the record as it is, and in that record it is impossible to say that it might not have been found that the circulation of the paper was in

<sup>111</sup> *Schenck v. United States*, 249 U. S. 47 (1919); *Frohwerk v. United States*, 249 U. S. 204 (1919); *Debs v. United States*, 249 U. S. 211 (1919); *Abrams v. United States*, 250 U. S. 616 (1919).

<sup>112</sup> The paragraphs referred to bring under the penalties of the act:

(1) Those who write or utter any disloyal, profane, scurrilous, or abusive language about (a) the form of government, or (b) the Constitution, or (c) the flag, or (d) the military or naval forces, or (e) the uniform of the army or navy, of the United States.

(2) Those who write or utter any language intended to bring (a) the form of government, or (b) the Constitution, or (c) the military or naval forces, or (d) the uniform of the army or navy, of the United States into contempt, scorn, contumely, or disrepute.

<sup>113</sup> Judge Hand, for example, took the following position in *Masses Pub. Co. v. Patten*: "If one stops short of urging upon others that it is their duty or to their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to produce a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view \* \* \* Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to violation of the law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them into execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government."

In contrast with this test laid down by Judge Hand, the Court of Appeals, in discussing the same case, said: "If the natural and reasonable effect of what is said is to encourage resistance to the law, and the words are used in the endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned." N. 100, *supra*.

quarters where a little breach would be enough to kindle a flame and that the fact was known to and relied upon by those who sent the paper out."

Although many of the federal courts seem to have adopted the remote tendency of the language as the test, thus making any criticism of the existing law precarious, it is submitted that Mr. Justice Holmes, speaking for an unanimous court in the *Schenck Case*, enunciated the best test yet devised when he said:

"The character of every act depends upon the circumstances in which it was done. The most stringent protection of free speech would not protect a man in falsely shouting 'Fire!' in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force. *The question in each case is whether the words were used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.* It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and no court could regard them as protected by any constitutional right."<sup>114</sup>

Within a short time after the Supreme Court had impliedly assented to the "clear and present danger" criterion of liability, reemphasized by Mr. Justice Brandeis in the *Schaefer Case*, the case of *Pierce v. United States* was decided, wherein the majority opinion, through Mr. Justice Pitney, apparently adopts the doctrines technically known as

<sup>114</sup> Italics ours. In *Schaefer v. United States*, 251 U. S. 466 (1920), Mr. Justice Brandeis re-emphasized the "clear and present danger" criterion of liability, and the majority of the court did not dispute his test. He speaks to this point in the following words: "But as this court has declared, and as Professor Chafee has shown in his 'Freedom of Speech in War Time,' 32 HARV. L. REV. 932, 963, the test to be applied—as in the case of criminal attempts and incitements—is not the remote or possible effect. There must be the clear and present danger. \* \* \* \* \* The extent to which Congress may under the Constitution interfere with free speech was in *Schenck v. United States* \* \* \* declared by a unanimous court to be this: 'The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.' This is a rule of reason. Correctly applied it will protect the right of free speech both from suppression by tyrannous, well meaning majorities, and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether, in a particular instance, the words spoken or written fall within the permissible curtailment of free speech, is, under the rule enunciated by the court, one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one. But its field is not unlimited."

"indirect causation" and "constructive intent" as a source of liability. Under such construction as this espionage acts and similar statutes are likely to be enforced most severely.<sup>115</sup>

If the majority of the Supreme Court did apply the "indirect causation" and "constructive intent" tests as a basis for liability under the Espionage Act that would seem to explain the disagreement of the judges through the group of decisions beginning with the Abrams Case. At least the court has not plainly overruled the Schenck Case and we find Mr. Justice Brandeis, in the case of *Gilbert v. Minnesota*,<sup>116</sup> again asserting the "clear and present danger" test.

Although the court did not pass upon the constitutionality of the Sedition Act in the Abrams Case, Mr. Justice Holmes' closing paragraph in this case leaves little to be said in conclusion on the subject of seditious libel. He said:

"Persecution for the expression of opinions seems to me to be perfectly logical. If you have no doubt of

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<sup>115</sup> Professor Goodrich explains the meaning of the doctrines mentioned, in the following words: "Admit that the evil the statute is aimed to prevent is one regarding which Congress has power to exercise preventive measures, causing insubordination in the army, for instance. What words come within the penalty of the law? May all speech which might be said to have some tendency, however remote, to bring about acts in violation of law be punished, or only words which directly incite to acts in violation of law? Suppose that a man criticises army food, do not his words have some tendency, at least in the mind of a jury with a strong imagination and in thorough sympathy with the war, to cause unrest and subsequent insubordination among soldiers? And it wouldn't matter, would it, whether the words were said directly to a soldier, or to a woman's club, some of whose members had relatives or friends in the army? Under this doctrine of 'indirect causation' words can be punished for supposed bad tendency long before the probability arises that they will break into unlawful acts. It is obvious that this test of liability is in sharp contrast with the 'clear and present danger' rule of Mr. Justice Holmes. \* \* \* \* \*

"Hand in hand with this 'indirect causation' doctrine goes that of 'constructive intent.' The only intent the defendant must have, is intent to write or speak the words he did. If the words have a bad tendency he will presume the man intended unlawful consequences, on the ground that he is presumed to intend the consequences of his acts. Now we have many places in the law where a man is liable for consequences even when he did not specifically intend them. If he shot off a gun at random in a crowded street, and killed someone, he certainly could not escape punishment by saying he didn't intend to kill his victim. We can say that he is presumed to intend the natural consequences of his act, which is pure fiction. We may accurately say that specific intent to hit the very person he did, is not by law required in order to to hold him liable. But often crimes do require a specific intent, and if they do, such intent, must be proved. When a penal statute, such as the Espionage Act, makes certain speech a crime, such as advocating curtailment of production of things necessary to the prosecution of the war, 'with intent \* \* \* to hinder \* \* \* the United States in the prosecution of the war,' must not the words be taken in their literal sense? To go back to the answer of Mr. Justice Holmes in the Abrams Case: 'They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind that we needed, and might advocate curtailment with success; yet even if it turned out that the curtailment hindered the United States in the prosecution of the war, no one would hold such conduct a crime.' " 19 MICH. L. REV. 496-498.

<sup>116</sup> 254 U. S. 325, 336 (1920). Justice Brandeis said: "Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise in governmental action, and in suppression lies ordinarily the greatest peril. *There are times when those charged with the responsibility of government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative, because the emergency does not permit reliance upon the slower conquest of error by truth. And in such emergencies the power to suppress exists.*" Italics ours.



your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. *But when men have realized that time has upset many fighting faiths they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.* That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is a part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death, unless they so *imminently* threaten *immediate* interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the first amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States' through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. *Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command 'Congress shall make no law \* \* \* abridging freedom of speech'.*"<sup>116a</sup>

It is difficult if not impossible to escape the force of the argument contained in this pertinent bit of pragmatic philosophy. It certainly contains a counsel of wisdom for those who are responsible for the enactment and judicial construction of peace-time legislation on this subject.

The position of the Supreme Court with respect to constitutional freedom of speech and press seems to be that Congress may forbid words which are intended to endanger national interests if in the exercise of a fair legislative discretion it finds it "necessary and proper" to do so; and that

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<sup>116a</sup> Italics ours.

the intent of the accused in uttering the alleged forbidden words may be presumed from the reasonable consequences of such words, though the presumption is rebuttable; and finally that the findings of juries in this class of cases will be treated on appeal like other penal cases. However the sounder view seems to be that Congress should be limited to forbidding words which are of a nature "to create a clear and present danger that they will bring about certain substantive evils which Congress has a right to prevent."<sup>117</sup> Advocates of both views would probably agree with Mill that "*even opinions lose their immunity when the circumstances in which they are expressed, are such as to constitute their expression a positive instigation to some mischievous act.*"<sup>117a</sup> In fact this is the ground of the decision in the Debs Case. Under either view the cause of freedom of speech and press is largely in the custody of a constantly changing public opinion operating through legislative majorities, courts and juries, which seems to be where the framers of the Constitution intended to place it.

Enemies of established government, whether right or wrong, commonly believe themselves to be in the right, and their followers look upon them as prophets. If they are punished for their belief, they acquire the power of martyrs, while if they are opposed only with argument and education, they usually lose all influence in a short while.<sup>118</sup>

The future of the Espionage Act is doubtful. On the one hand there is a decided demand for some such law to suppress bolshevism and similar movements against the government. On the other hand there is an agitation for the removal of all restrictions upon speech and press on the ground that such restrictions are no longer necessary.<sup>119</sup>

Remembering, that for our purposes, our only interest in the past is for the light it throws upon the present, and the predictions of what the courts will do in the future; that an ingenious research for and adherence to dogma is not so important as a study of the ends sought to be attained and the reasons for desiring them; that there are some other forces besides logic at work in the development of law—which clearly show that the means do not exist for deter-

<sup>117</sup> In accord with this view see BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 369.

<sup>117a</sup> Italics ours.

<sup>118</sup> 6 VA. L. REV. 399.

<sup>119</sup> 17 MICH. L. REV. 665.

minations which shall be good for all time—and a *given decision* “can do no more than embody the preference of a given body at a given time and place,” it is of the essence of improvement that we strive to get behind rules of law to human facts, to the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. In other words, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under particular circumstances and which shall be protected and become the foundation of a legal right.<sup>120</sup> However, it is conceded that the socialization theory, just presented, is not always a very helpful suggestion practically,<sup>121</sup> although, as has been recently pointed out, the modern trend of judicial thinking seems to favor its extension.<sup>122</sup> At least, it is no less true here than it is elsewhere that the end of the law is to secure the greatest good to the greatest number.

In conclusion we find our problem reduced to the state of the man who was brought before the court for carelessly swinging his arms and hitting a man in the nose. He protested that this was a free country and a man had the right to swing his arms. “Yes,” said the court, “but your right to swing your arms ends where the other man’s nose begins.” In a larger sense, then, a man’s right to speak and to write must be curbed when, in the wisdom of our courts, legislatures and juries, it transgresses other constitutionally protected individual rights or interferes with the proper preservation of the social compact and the body politic. All through the ages, as we have seen, men in whom the desire for a free press burned the brightest have unanimously proclaimed that some restraint is always necessary. They have seldom agreed as to the precise places where the lines should be drawn, since the rules and principles applicable in this field cannot be ascertained with that certainty which obtains, for example, in the field of property law. “The gradual process of judicial inclusion and exclusion,” which has served so well in the interpretation of other constitutional provisions by blocking out concrete

<sup>120</sup> See 10 HARV. L. REV. 457; CHAFEE, FREEDOM OF SPEECH 35.

<sup>121</sup> See note 18 MICH. L. REV. 37.

<sup>122</sup> See Professor HARDMAN’s article entitled “Stare Decisis and the Modern Trend,” 32 W. VA. L. QUAR. 163.

situations on each side of the line until the line itself becomes plain, has been of little value when applied to the First Amendment because the cases are too varied in character to determine the fundamental principle on which the classification of precedents, in their respective boundaries, is based.<sup>123</sup> However it is not hard to distinguish between an honest expression of opinion and vituperation, between constructive criticism and sedition. For any government to fail to attach legal responsibility for language which imminently imperils the public safety or infringes upon those inalienable rights, for the perpetuation of which governments are instituted among men, would be suicidal. On the other hand it is only in despotisms that one must speak in whispers, or in the dark, on matters touching the common welfare. It is the golden mean between these two intolerable extremes which our fundamental law, as interpreted by the courts, seeks to maintain.

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<sup>123</sup> CHAFEE, *FREEDOM OF SPEECH* 16.

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